

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.**

In the Matter of:	)	
	)	
Request for Review and/or Waiver of a	)	
Decision of the Universal	)	
Service Administrator	)	CC Docket No. 02-6
	)	
by	)	
	)	
P.A.C.E. High School	)	
Cincinnati OH	)	

TO: Marlene H. Dortch, Secretary  
Federal Communications Commission  
Office of the Secretary  
445 12th Street, SW  
Washington, DC 20554

P.A.C.E. High School ("P.A.C.E.") respectfully requests that the Federal Communications Commission ("FCC" or "Commission") review a Notification of Commitment Adjustment Letter ("COMAD") whereby the Administrator of the Universal Service Administrative Company ("USAC") is seeking to rescind previously approved E-Rate Program funds for FRN 1620035. The Request for Review and/or Waiver is made pursuant to 54.719 through 54.723 of the Commission's rules.<sup>1</sup>

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<sup>1</sup> 47 C.F.R. §§ 54.719–54.723

**Basic Information:**

Billed Entity Number: 16039428  
FCC Form 471 Application Numbers: 550862  
Funding Request Number Appealed: 1620035  
Date of Notification of Commitment Adjustment Letter: May 21, 2014

**Contact Information**

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**REASON FOR APPEAL**

Although FRN 1620035 was funded in 2007, on May 21, 2014 the Schools and Libraries Division of the Universal Service Administrative Company ("USAC") issued a Notification of Commitment Adjustment Letter ("COMAD") for Funding Request Number 1620035 stating:

After multiple requests for documentation and application review, it was determined that the funding commitment for this request must be rescinded in full. Funding was provided for the following ineligible items: installation of products by Epiphany Management that were purchased from CDW-G on FRN 1895867. Installation, activation, and initial configuration of eligible components are eligible if they are part of a contract or bid for those eligible components. Such eligible services may include basic design and engineering costs and basic project management costs if these services are provided as an integral component part coincident with installation. The installation, activation or initial configuration is not part of a contract or bid for those eligible components. The pre-discount cost associated with these items is \$19,890.00. At the applicants 90 percent discount rate, this resulted in an improper commitment of \$17,901.00. FCC rules require that the associated installation for a product or service in general will be provided by the same service provider from which the applicant purchased the product or service. Based on the Miscellaneous section of the Eligible Services List, installation, activation, and initial configuration of eligible components are eligible if they are part of a contract or bid for those eligible components. See the web site, <http://www.usac.org/sl/applicants/beforeyoubegin/eligible-services-list.aspx> for the Eligible Services List. Therefore, USAC has determined that the applicant is responsible for the rule violation. Accordingly, the commitment has been rescinded in full.

For the reasons that follow, P.A.C.E. requests the COMAD seeking rescission of the funding in the amount \$37,080.00 for FRN 1620035 be reviewed and dismissed or, in the event the Commission supports that USAC acted correctly, it be granted a waiver of the applicable rule.

NOTE: that in the following discussion, for convenience, USAC's rationale underlying the COMAD will be referred to as "2014 Interpretation".

#### **STATEMENT IN SUPPORT OF REQUEST FOR REVIEW AND/OR WAIVER**

**1. USAC initiated its Compliance Review more than five years after the final delivery of service for FRN 1620035**

The FRN subject of this appeal (for the installation of equipment) was applied for in FY2007 in the Internal Connections category. The FRN was funded and the initial service delivery deadline was extended until September 30, 2010, but the installation was never performed. On March 31, 2014 USAC's Compliance Review Team issued its initial Request for Information concerning FRN 1620035.

The Commission's Fifth Order, DA 04-190, which went into effect for FY2004, addressed the five-year look back period as commencing from the last

date services were delivered – not the last date it was *possible* to deliver services, which is the position USAC has taken. Even as recently as its July 11, 2014 Schools and Libraries News Brief USAC stated that documentation must “be retained for five years after the last date to receive service”.

P.A.C.E.’s response to USAC’s Information Request asserted that USAC lacked authority to audit or investigate this FRN because the investigation was launched more than five years after the last date services were delivered. USAC responded stating that “...for FRN 1620035 a service date extension was requested and granted to 9/30/2010 which is with in the five years for investigation”.

In its second response to USAC, P.A.C.E. cited the Commission’s Fifth Order, which unequivocally states: at page 12, paragraph 32, “*Under the policy we adopt today, USAC and the Commission shall carry out any audit or investigation that may lead to discovery of any violation of the statute or a rule within five years of the final delivery of service for a specific funding year.*” (emphasis added) and at page 16 at paragraph 47: “*Therefore, in this Order, we amend section 54.516 of our rules to require both applicants and service providers to retain all records related to the application for, receipt and delivery of discounted services for a period of five years after the last day of service delivered for a particular Funding Year. This rule change shall go into effect when this order becomes effective and, as such, will apply to Funding Year 2004 and thereafter.*” (emphasis added)

P.A.C.E. stated that since no products or services were delivered or money disbursed after July 1, 2007, P.A.C.E. is not required to have maintained documentation for this FRN beyond July 1, 2012. Even at a worst case scenario, USAC should have deemed June 30, 2008 to be the last date of service for the FRN, which date was also beyond the five-year look-back period. USAC reasoned that since the FRN had been extended to September 30, 2010 it was allowed to investigate the FRN. Since this issue wasn’t being reviewed until 2014, and no services were ever delivered, it is P.A.C.E.’s position that the extension of the FRN allowed for the *possibility* of service being delivered by that date – something quite different from the Commission’s Fifth Order discussions and Order addressing an *actual* date of final performance as being the date from which the five-year look-back period begins.

The filing of this Request for Review and/or Waiver seeks clarification of this issue.

**2. USAC has rendered a 2014 Interpretation of long-standing Eligible Services Lists' language, which language is subject to semantic interpretation**

USAC's basis for rescinding the funding commitment for FRN 1620035, states: "FCC rules require that the associated installation for a product or service in general will be provided by the same service provider from which the applicant purchased the product or service". Although in the Internal Connection Sections of the FCC Eligible Services List(s) there has been a long-standing description for Installation: *Installation, activation, and initial configuration of eligible components are eligible if they are part of a contract or bid for those eligible components*, USAC first rendered a new interpretation in 2014 and applied it retroactively to this 2007 funding request. This is supported by the fact that application #550862 went through a Program Integrity Review ("PIA") and was funded, so it is apparent that this interpretation was not the one in effect by USAC at that time.

Applicant asserts that another way to read the phrase in question is: *'if it is part of a contract* for installation of eligible components, installation is eligible'. This interpretation would make the installation an eligible service as long as the applicant and vendor entered into a contract for installation of eligible equipment. Applicant believes that this latter interpretation is the one USAC used in FY2007 and at the time of the PIA review, when questions asked on this FRN were answered satisfactorily and resulted in funding being awarded for the installation-only services. Further, the COMAD uses the phrase "in general" which implies that there are permissible exceptions to the newly interpreted rule.

**3. The funding request at issue was funded after PIA review**

As stated above, this FRN was questioned in PIA. It is completely clear from P.A.C.E.'s response that the installation services provided by Epiphany Management Company under FRN 1620035 were for the installation of equipment purchased from Dell under FRN 1578620. P.A.C.E.'s responses were deemed satisfactory by PIA and Quality Assurance teams and resulted in FRN 1620035 being funded. For USAC to invoke the 2014 Interpretation as the basis for the COMAD is contrary to USAC's actions that allowed for the original funding award.

**4. The 2014 Interpretation is contrary to the cost-effectiveness mandates of the FCC**

To render an interpretation in 2014 that installation and the products themselves must be on one contract from one vendor has the potential consequence of forcing an applicant to make non-cost-effective decisions. For instance, certain E-rate Service Providers of Internal Connections Equipment do not, and have never, provided installation services. This is true of Cisco and Dell, two of the largest E-rate equipment vendors. An applicant would not be able to avail itself of the cost savings of purchasing (online) from either of these vendors because they do not offer installation services. Also, if an applicant were to purchase products from more than one source, the 2014 Interpretation would require the applicant to contract with more than one vendor for installation; this would almost certainly result in a more cumbersome, less cost-effective solution.

In fact, this is the very situation for the FRN at issue – the applicant purchased cabling and fiber from Epiphany Management Company, LLC (SPIN: 143031426) (“Epiphany”), who as part of the complete project, installed the products purchased from them and also installed products purchased from DELL. Applicant chose to purchase from two vendors because it was the most cost-effective solution for them.

The above situation is but one example of how imposing the requirement of the 2014 Interpretation would preclude an applicant from obtaining a cost-effective solution of this kind. Another example is where a vendor providing installation is a reseller of the hardware who would likely charge the applicant a higher cost than that charged by the manufacturer, especially for smaller projects. Conversely, a hardware manufacturer would likely have to charge more for installation services since that is not their primary business and it would likely be outsourced/sub-contracted out at a higher cost.

Finally, USAC’s “all or nothing” 2014 Interpretation fails to take into account ‘hybrid’ situations where some eligible products are purchased from the installer while others are not, as was the case with the contract for this FRN. As can be seen from the Epiphany proposal submitted to the USAC Compliance Review Team, Epiphany provided both the installation for cabling and fiber as well as the actual CAT5 cabling and the fiber itself *in addition* to the installation of the equipment purchased from DELL. Even though it was pointed out to USAC that a portion of the contract between P.A.C.E. and Epiphany fully complied with the 2014 Interpretation, USAC completely disregarded this and nonetheless issued the COMAD for the full amount of the FRN.



Does it really make sense to have multiple vendors providing installation? To justify a 'yes' would almost certainly result in higher, yet eligible, costs to the applicant, especially on smaller projects. In turn, this would be in direct contravention of the FCC's mandate that an applicant must apply for the most cost-effective solution. Applicant feels that it is against FCC rules to force an applicant into making less cost-effective choices and that the newly interpreted and mandated "one provider/one contract" rule must be reconciled with the mandate for cost-effective solutions before any COMAD based on this interpretation should issue.

**5. To require one provider/one contract for both products and installation compromises the competitive bidding process.**

Applicant believes that to require one provider/one contract for both products and installation is a violation of the FCC's competitive bidding rules. This is true because small businesses that can provide only installation services may not qualify to become hardware re-sellers, as certain financial requirements must first be met in order to qualify as such. Given these circumstances, these small vendors would be precluded from bidding on the combined services, whereas they would be able to bid on the installation portion alone, possibly resulting in a more competitive price. Under the 2014 Interpretation the bidding process would no longer be truly 'open and fair', but instead would be biased in favor of larger vendors with greater financial resources.

Further, the 2014 Interpretation forces an applicant to choose between (1) incurring higher hardware costs in order to select an installation vendor with whom they may have prior experience or one with a solid reputation for quality work; and (2) an unknown installer contracted for with the hardware vendor, who is likely a sub-contractor and whose qualifications remain unknown and unascertainable to the applicant. This also impedes an applicant's discretion to construct a bidding evaluation matrix customizable to the applicant's individual requirements and needs.

**6. USAC's retroactive application of the 2014 Interpretation is against FCC rules and against the public interest**

The Commission has recognized that an application should be judged by the rules and procedures in effect at that time.<sup>2</sup> USAC has overstepped its authority and acted contrary to FCC policy by issuing a COMAD in 2014 based on a new interpretation of a rule that was in place but not interpreted that way in Funding Year 2007.

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<sup>2</sup> See *Ysleta Independent School District*, DA 12-1797

Further, unless USAC will be applying this retroactive rule interpretation to ALL installation-only FRNs for ALL prior funding years, singling out this applicant is inequitable, prejudicial to the applicant, and against the public interest.

## CONCLUSION

Throughout its application process, P.A.C.E. demonstrated compliance with E-rate program rules and regulations. It followed all core E-rate program requirements and intended no fraud, abuse or waste of E-rate funds. Since in 2007 FRN 1620035 was scrutinized in PIA and a funding award ensued, it is evident that for that funding year USAC employed a different interpretation of the Eligible Services List language at issue. In 2014 it is unwarranted for USAC to rescind funding based on its new interpretation of this rule; the rules and procedures in place for FY2007 are what should be applied.

The Commission has repeatedly reiterated its authority under 47 C.F.R. §1.3 to waive rules for good cause shown and has routinely waived compliance for violations when the record contains no evidence of intent to defraud or abuse the E-rate program and where the public interest is better serviced by granting a waiver.<sup>3</sup> So under the circumstances, should the Commission find USAC to have acted correctly, P.A.C.E. High Schools requests a waiver of any technical rule violation, should any exist.

Therefore, for good cause shown, and to better serve the public interest, P.A.C.E. High School respectfully requests that the Commission:

1. Grant its Request for Review;

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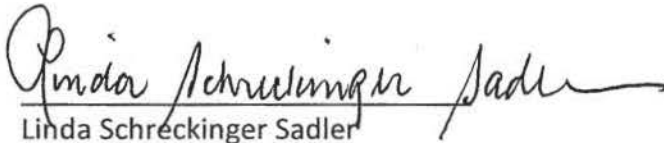
<sup>3</sup> See *Request For Review of Decision of the Universal Service Administrator by Bishop Perry Middle School*, , DA No. 06-54; *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).



2. Find that USAC violated the Commission's Fifth Order, DA- 04-190, by initiating its investigation into this FRN more than five years after the last date services were delivered;
3. Clarify the five-year look-back provisions of the Fifth Order as pertains to situations where an FRN's service delivery date has been extended;
4. Find that P.A.C.E. High School did not violate E-rate program rules;
5. Rescind USAC's decision to issue a COMAD for FRN1620035; and
6. Grant P.A.C.E. a waiver of any technical rule violation, as appropriate.

Thank you for your consideration.

Respectfully submitted,

A handwritten signature in black ink, reading "Linda Schreckinger Sadler". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Linda Schreckinger Sadler  
Counsel to P.A.C.E. High School